

Navigating the Labyrinth of Enforcing Foreign Awards

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Abstract

Amicable resolution of disputes has been the way since the Vedic period and is still evolving with the new legislation passed towards its growth. These mechanisms are affordable and come with numerous advantages. India is rapidly becoming a hub for the resolution of disputes through alternate resolution mechanisms considering the rapid growth in industries and globalization. These make way for intra-border disputes and trans-border disputes. Alternate dispute mechanisms are the preferred methods over any other dispute resolutions considering they have low claim value and there is a requirement for speedy solutions on the table. The effectiveness of alternative dispute mechanisms is determined by the effective execution of the arbitral awards. This paper examines the intricate landscape surrounding the enforcement of foreign arbitral awards and explores the multifaceted challenges that impede the seamless execution of such awards across national borders. Drawing on a comprehensive review of international arbitration laws, judicial decisions, and case studies, the paper identifies and analyzes key obstacles faced by parties seeking to enforce foreign awards. These challenges encompass jurisdictional issues, divergent legal frameworks, and the often complex interplay between national courts and arbitral tribunals. The paper also sheds light on the impact of geopolitical considerations, cultural differences, and the evolving landscape of international relations on the enforcement process. Ultimately, the analysis presented in this paper strives to illuminate pathways toward a more harmonized and effective enforcement regime for foreign arbitral awards in the global legal arena.

Keywords: alternate dispute resolution, arbitral tribunal, arbitration, execution

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Introduction

Alternate dispute resolution mechanisms involve the parties meeting a neutral third party who facilitates them in reaching an agreement by overcoming their differences. This settlement is advantageous to both the parties and the third and neutral individual helps the parties to understand each other's perspective. There are four steps involved in an alternate dispute resolution mechanism. They are the opening phase, exploration phase, bargaining phase and settlement phase.

The Arbitration and the Conciliation Act of 1996 along with some international instruments such as the New York Convention only cater to the commercial disputes that are under the Indian Consumer Protection Act of 1986. A significant number of disputes in India are resolved through court-annexed mediation as per Section 89 of the Code of Civil Procedure¹. Therefore, there is a gray area concerning matters of purchases made for commercial purposes. The research work dwells on this area in the later part.

India was one of the first nations to adopt and ratify the principles of the New York Convention in 1960. In effect, the Foreign Awards (Recognition and Enforcement) Act was passed in 1961. Article V of the Convention establishes the limited grounds for challenges to a foreign award. The Arbitration and Conciliation Act has changed multiple times to fit the recent trends in globalization and industrialization. While section 36 of the Act provides for the enforcement of domestic awards, Part II of the Act provides for the enforcement of foreign arbitral awards which go according to the international instruments.

Arbitral Awards

¹ S. 89 of Code of Civil Procedure

It is the decision delivered by the arbitration tribunal during the arbitration proceedings.² This decision made by the arbitration tribunal has equivalent capacity to that of the order or decree passed by a traditional court. Section 2(1)(c) of the Arbitration and Conciliation Act defines an arbitral award.³ These awards have an individual approach since the decree or order passed by the court depends on the merits of the case and is therefore individualized.

The elements of a foreign arbitral award and the difference are drawn in the case of *Serajuddin and Co v. Michael Golodetz*⁴. The arbitral award that has been pronounced has to be given in foreign lands by a foreign arbitrator with the application of foreign laws and one of the parties is a foreign national. The foreign award must be arising out of a commercial legal relationship and both the countries must have ratified according to the New York Convention.

In India, the Code of Civil Procedure and the Arbitration and Conciliation Act of 1996 facilitate the enforcement of arbitral awards. But the act also exclusively mentions that the party who has received an arbitral award has to wait for three months before filing an application requesting the execution of the award. The limitation period of the award is up to twelve years and Order 21 of the Code of Civil Procedure provides for the enactment of the decree. The commercial division of the High Court has jurisdiction over such subject matters. Enforcement applications of the Awards can be filed only in the High Courts. These courts also have limited powers in terms of interim orders in emergency cases.

Shift To Pro-Enforcement of Foreign Arbitral Awards

The Indian courts largely rely on the principle of non-interference in the matters of execution of the awards. If the country does not support the enforcement of the foreign arbitral award, then the whole exercise becomes futile. In the end, the parties will approach the traditional court which will defeat the whole purpose. Therefore, the legislation has taken proactive steps to promote efficient

² Yash Vardhan Garu and Akanksha Bohra, Pro Enforcement Trend of Foreign Arbitral Awards in India: A Critical Analysis, SCC Online, published on September 7, 2022.

³ S. 2(1)(c) Arbitration and Conciliation Act, 1996.

⁴ 1959 SCC OnLine Cal 196.

alternate dispute resolution procedures. The judiciary has gone to lengths to make Indian courts extremely arbitration-friendly. The judgment of *BALCO Employees Union v. Union of India*⁵ acted as a catalyst in transforming India's perception of alternate dispute resolution mechanisms. This judgment also evaluated India's status as an enforcement-friendly nation.⁶

The enforcement procedure follows a simple three-step process where the party who has been awarded moves an application in the court under section 47 of the Arbitration Act. The opposite party responds to this application with their claims. The court examines the facts that are relevant to the case and passes a decree to execute the order under section 49 of the Act.

Challenges In Enforcing a Foreign Award

1. Procedural Challenges

These are the kinds of challenges that occur during the arbitral tribunal's decision-making process. If an arbitral award is beyond the scope of jurisdiction of the Tribunal, then it is forced to not delve into matters beyond the subject matter. If the award falls outside the jurisdiction of the tribunal, then such an award is likely to be overturned by the courts. An award is likely to be set aside if the tribunal is formed without the consent of the parties. If at any point the procedure is in contradiction to the principles of natural justice, then the award is set aside.

2. Challenges concerning enforcing the norms of public policy

'Ex dolo malo non oritur action' means that no court of law will aid a man who bases his cause of action upon an immoral or illegal activity. As per this maxim, an agreement will be deemed void if a contract is unlawful. There are various instances where the parties have raised the contention of public policy to avoid enforcement of a foreign award. This was first seen in the case of

⁵ 2 SCC 333 (2002).

⁶ Adi B. Shroff, "Enforcement in India of Foreign Commercial Awards.", *Journal of the Indian Law Institute*, Vol. 21, No. 1, 1979, pp. 31—44, (<https://www.scconline.com/DocumentLink/9BQ11emB>)

*Renusagar Power Co Ltd v. General Electric Co*⁷. The party was alleged to have violated the FEMA principles and the award was against public policy. The organization sought the Supreme Court's refusal to comply with the foreign award and argued that it would contradict FERA and certain principles of public policy. The Apex Court interpreted the principles laid down in the New York Convention. The court spelled out that an arbitral award cannot be refused to comply with because it contradicts the country's law and the ground that holds any validity in court is if it falls against the public policy. The court also provided a wider interpretation of the term 'public policy'. It criticized the watertight compartmentalized interpretation that was adopted so far with the mala fide intention of refusing the compliance of an arbitral award on the ground that it goes against public policy. The court thought that it should cause some sort of serious violation to be not complied with and not just public policy.

Refusal of an arbitral award on the grounds of public policy has three sub categories. They are:

- a. Fundamental policy of Indian law
- b. Interests of India
- c. Justice and morality

In the case of *Life Insurance Corporation of India v. Escorts Limited*⁸ and *M G Wagh and Ors v. Jay Engineering Works Ltd*⁹, the court upheld the enactment of FERA since it served the economic interest of the country. The primary objective of the Act was to ensure that the foreign exchange value does not become detrimental. Foreign awards would be invalidated in case they are in contravention of the principles of FERA and thus result in the violation of a public policy. Section 47 of the Act clarified that the permission has to be obtained by the Reserve Bank of India or the appropriate government but in practicality, it meant that the permission was required for enforcement and the court upheld that this principle was not against public policy.

3. Impact of the transition from the Foreign Exchange Regulation Act to the Foreign Exchange Management Act

⁷ 1994 Supp (1) SCC 644.

⁸ 1986 AIR 1370

⁹ AIR 1973 Cal 33

The first one was established during the closed economy era and the latter was established during the era of globalization and industrialization. Foreign Exchange Regulation Act was established to be a policy legislation and facilitated for imposition of fines for violating the principles laid down. It was after the judgment of *Renusagar Power Co Ltd v. General Electric Co.* that the Central Government realized the loopholes in the legislation and how it could be violated for mala fide intentions.

This led to the enactment of the Foreign Exchange Management Act which was a very progressive and a more liberal regime. The objective of the legislation is non-identical to that of the Foreign Exchange Regulation Act. The gray areas with the new legislation which presents itself as challenges to the enforcement of foreign arbitral awards are discussed.

Enforcement of a foreign award in a non-reciprocating country

It requires the plaintiff to sue based on a foreign judgment or the basis of the original cause of action. In case of an unsuccessful litigation then no further action can be taken, and the decree can be continued in India only if the litigation is successful. A certified copy of the judgment and an additional certificate from an official who is representative of the Central Government of India in the non-reciprocating nation. This judgment must also satisfy the conditions put forth in Section 13 of the Code of Civil Procedure. Only if it satisfies all these conditions, the decree is effective.

4. Approach of the Indian Courts to Resolve the Issues Concerning the Enforcement of Foreign Awards

i. Shakti Nath and Ors v. Alpha Tiger Cyprus Investments¹⁰

In this case, the parties were a part of the shareholders' agreement and the foreign investors in this said agreement had the exclusive rights of compulsorily requiring the Indian promoters to acquire the shares owned by them in case of an uncertain event where the

¹⁰ OMP (COMM) 154/2016

condition of the agreement had not been fulfilled by the parties within the stipulated time of the agreement. The agreement mentioned that the rate of the shares would be equal to the investor's capital along with the post-tax of nineteen percent on the investor's capital. This resulted in a dispute between both the parties to the shareholders agreement and therefore the matter was referred to arbitration in Delhi. The arbitral tribunal considered the contentions of both the parties and pronounced the award in favor of the foreign investors, and they were stipulated to receive the damages due to the breach of agreement of the promoters.

The promoters challenged this order of the arbitral tribunal claiming that the petition was a mala fide attempt of the foreign investors to make way for the enforcement of their right to acquire the shares as per the agreement. They argued that this move of the foreign investors was done in violation of the circulars issued by the Reserve Bank of India which expressly prohibited such foreign investors from exiting an agreement whilst receiving their shares as a remedy for any breach of the investors. The arbitral tribunal observed that this remedy that was sought was damage awarded to the breach of contract but not an option to exit the shareholder agreement. The High Court drew a line between 'a claim for damages' and an 'enforcement of rights' which in this case was to procure the shares for the price that was contracted in the agreement. Since the procurement of the shares was the right of the foreign investors, the court advised the promoters to seek mediation to resolve the dispute since a court order would likely contradict public policy.

ii. NTT Docomo v. TATA Sons Limited¹¹

The petitioner had invested intending to enter a shareholder agreement with the respondent. As per the agreement both the parties were obligated to perform certain key indicators within a stipulated period. If these conditions were not fulfilled, then the party could sell the shares at the price that was quoted.

¹¹ O.M.P.(EFA)(COMM.) 7/2016

The TATA group failed to find a buyer before the expiration of the period that was mentioned in the agreement. An arbitral tribunal seated in London pronounced an award in favor of Docomo for TATA's breach of the agreement, to which TATA raised a concern under section 48 of the Arbitration and Conciliation Act. Through this case, the court answered the question of the 'appropriate government' and 'competent authority' according to the Arbitration and Conciliation Act.

iii. Vijay Karia and Ors v. Prysmian Cavi E Sistemi SRL and Ors¹²

The court upheld the validity of the Arbitration and the Conciliation Act over the Foreign Exchange Management Act. The appellants contested that the arbitral award pronounced by the tribunal goes against the principles established in the Foreign Exchange Management Act. The court gave its opinion that in the hierarchy followed by the judiciary, the New York Convention is the primary pro-enforcement, and then comes the Arbitration and Conciliation Act which should be aligned with the international instruments. The court quoted the case of *Cruz City Mauritius Holdings v. Unitech Ltd*¹³ where any inconsistency with the Convention and the fundamental policy of the Indian Law arises then the court will prioritize the convention. If the convention is not prioritized, then the entire objective of it will be defeated. A substantive legislative policy is the answer to the inconsistencies that arise during the arbitration.

Way Forward

The European Model is one of the seamless means to consumer disputes occurring in the international consumer market. Several countries in the part of Europe established an open market which allows them to conduct free trade between the members since they have a unified currency boosting the trans-border trade. The twenty-eight nations formulated and adopted directives and regulations for inter country consumer disputes and there is also a facility for online dispute

¹² 2020 SCC OnLine SC 177

¹³ EX.P.132/2014 & EA(OS) Nos.316/2015

resolution. This facility allows the consumer to seek alternative dispute mechanisms without going to the court or spending money on the legal proceedings. Even though the directives and principles are established they do not have any regulations on the enforcement aspect, and it is solely up to the member nations to enforce it through domestic laws.

The proactive approach of the Indian Courts in the matters of arbitration is an applaudable job and this opens the Indian markets to the foreign investors. The narrow concept of public policy may be the only hindrance that the courts may have to overcome but the development in jurisprudence will enable the judiciary to develop further. The downside to this development is that the foreign investors might raise claims of arbitration proceedings unnecessarily under the disguise of breach of contract by the promoters. This would also enable them to escape the watchful eyes of the Reserve Bank of India.¹⁴

1. Changing Dynamics of Arbitration

Adopting alternative dispute resolution mechanisms changes the legal landscape and enhances the effectiveness of the courts. The courts have to set jurisprudence and ensure that the awards are seamlessly integrated to the parties to resolve the dispute.

2. Creating balance

Acknowledging the importance of avoiding judicial overreach, there should be exploration of the delicate balance that courts must strike to foster a supportive environment for arbitration while respecting the principles of autonomy and confidentiality inherent in the arbitral process.

Conclusion

The research work has delved into the intricate landscape surrounding the enforcement of foreign arbitral awards, revealing a complex interplay of legal, jurisdictional, and geopolitical challenges. Through a comprehensive review of international arbitration laws, judicial decisions, and case studies, this paper has identified and analyzed the multifaceted obstacles faced by parties seeking

¹⁴ Abhijnan Jha and Urvashi Misra, *Enforcement of Foreign Arbitral awards and Challenges Based on India's Foreign Exchange Laws*, AZB Partners Publications, June 17, 2020.

to enforce foreign awards. The challenges explored in this paper, ranging from jurisdictional ambiguities to divergent legal frameworks, underscore the need for a nuanced understanding of the enforcement process. The impact of geopolitical considerations and cultural differences further emphasizes the dynamic nature of the international legal landscape and its influence on cross-border dispute resolution. However, amid the challenges, this paper also illuminates pathways towards a more effective and harmonized enforcement regime. By acknowledging the complexities and advocating for strategic reforms, it contributes to the ongoing discourse on optimizing the enforcement of foreign arbitral awards.